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Supreme Court, U.S.
FILED

02 221 MAY 28 2002

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ARNOLDO MONTALBAN
Petitioner

versus

STATE OF LOUISIANA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Arnoldo Montalban's guilty plea was unknowing, involuntary and unintelligent, requiring that it be vacated?

2. Whether Arnoldo Montalban's guilty plea was invalid because he was not advised of the immigration consequences prior to his plea of guilty?

3. Whether Arnoldo Montalban's attorney provided ineffective assistance of counsel when he failed to advise Arnoldo Montalban of the immigration consequences of his guilty plea?

4. Whether immigration consequences of a guilty plea are now considered direct consequences of a guilty plea considering the changes in immigration law?

5. Whether Arnoldo Montalban has been subjected to cruel, excessive and unusual punishment?

6. Whether the State breached its plea bargain agreement with Arnoldo Montalban when it notified the INS immediately after the plea of guilty and immediately after the Louisiana Supreme Court reversed the ruling of the Louisiana Court of Appeal, Fifth Circuit (which had vacated Arnoldo Montalban's guilty plea) of Arnoldo Montalban's conviction and sentence in order to ensure his detention and inevitable deportation by the INS

LIST OF PARTIES

The petitioner is Arnoldo Montalban.

The respondent is the State of Louisiana.

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REPORTS OF OPINIONS BELOW

The decision of the Louisiana Supreme Court is reported as State v. Montalban, 2000-2739 (La. 2/26/02), 810 So.2d 1106. The decision of the Louisiana Court of Appeal, Fifth Circuit is unreported (State v. Montalban, 00-1257 (La.App. 5 Cir. 6/27/00)). The order by the Louisiana Court of Appeal, Fifth Circuit denying application for rehearing issued on September 18, 2000 is unreported. The decision of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana is unreported. All four documents are reproduced in the appendix.

JURISDICTION

The February 26, 2002 decision by the Louisiana Supreme Court reversed the June 27, 2000 decision of the Louisiana Court of Appeal, Fifth Circuit, which had reversed the May 26, 2000 decision of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.

Petitioner files the instant application for a writ of certiorari under the authority of Rule 10 of this Honorable Court. This Honorable Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

There are no specific constitutional provisions, treaties, statutes, ordinances and regulations involved in this case. This case involves a Judgment of the Louisiana Supreme Court, establishing jurisprudential precedent in the State of Louisiana concerning important questions of federal law, which conflicts with relevant decision of this Honorable Court, such as Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which conflicts with the decisions of other state courts of last resort, and which raises important federal questions of federal law that have not been, but should be, settled by this Honorable Court.

STATEMENT OF THE CASE

Arnoldo Montalban (hereinafter referred to as Montalban), who is twenty years of age and a native of Costa Rica, moved to the United States at age three, and has resided in this country ever since as a resident alien. On November 15, 1999, Montalban, under the advice of counsel, tendered a plea of guilty to criminal charges brought against him by the State of Louisiana under Louisiana Revised Statute 14:55 F III, aggravated criminal damage to property. Montalban was sentenced by the Trial Judge to imprisonment at hard labor for a term of three years. The sentence was suspended and Montalban was placed on active probation for a term of three years. Said sentence was in accordance with the plea agreement offered to Montalban by the State.

Shortly after Montalban entered into the plea agreement and tendered his plea of guilty, he learned that his conviction and sentence subjected him to deportation by the Immigration and Naturalization Service (hereinafter referred to as INS) when he was detained by INS and deportation proceedings were initiated against him. He had not been advised of this by his counsel, by the Assistant District Attorney or by the Court prior to his tendering a guilty plea in order to eliminate the risks inherent in a trial on the merits, receive probation rather than incarceration, and resume his life in the United States and his rehabilitation. Therefore, on April 24, 2000, Montalban filed a Motion to Vacate Guilty Plea, Set Aside Conviction and Sentence, and to Re-Open Proceedings on the grounds that his plea agreement was not knowingly and intelligently entered, that the sentence imposed upon him would subject him to cruel, excessive and unusual punishment, and that he received ineffective assistance of

counsel.

On May 26, 2000, the Trial Judge heard oral argument on Montalban's motion. He then rendered Judgment denying the motion on the grounds that several pre-trial conferences had taken place before the guilty plea was tendered, that Montalban understood the Boykinization, and that Montalban had ample opportunity to become a citizen of this country and chose not to, creating the present problem of his deportation on his own.

Thereafter, Montalban filed for supervisory review with the Court of Appeal, Fifth Circuit which, on July 28, 2000, granted Montalban's writ, vacating his guilty plea. The deportation proceedings against Montalban were suspended at that time and Montalban was released from the custody of INS. The State then filed an Application for Rehearing with the Court of Appeal, Fifth Circuit. The State's Application for Rehearing was denied by the Court of Appeal, Fifth Circuit on September 18, 2000. The State then filed an Application for Writs of Prohibition, Mandamus and Certiorari with the Louisiana Supreme Court, which was granted on September 21, 2001. Oral argument was had on November 30, 2001. On February 26, 2002, the Louisiana Supreme Court issued ruling reversing the decision of the Court of Appeal, Fifth Circuit and reinstating the Trial Court's denial of Montalban's motion to vacate his guilty plea. Shortly thereafter, INS again detained Montalban and again initiated deportation proceedings against him, which proceedings are pending.

REASONS FOR GRANTING WRIT

I. Conflict between the States

As can be seen in the attached February 26, 2002 judgment of the Louisiana Supreme Court, the law of the State of Louisiana is that possible deportation is a collateral consequence of a guilty plea which need not be explained as a requirement for a valid guilty plea. However, in contrast to Louisiana's unwillingness to take responsibility for insuring that alien residents knowingly and intelligently decide to plead guilty, numerous other States have taken on that responsibility by requiring that judges inform aliens of possible deportation consequences of their guilty pleas.[1] This Honorable Court has recognized as much in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 2291 n. 48 (2001).

Other State courts have also been willing, in the absence of statutes, to hold that a defendant cannot make a knowing and intelligent decision to plead guilty if unaware that deportation could result from such a plea.

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[1]See California, Cal. Penal Code § 1016.5, Connecticut Conn. Gen. State. 54-1j, Florida, Fla. R.Crim. P. Rule 3.172, Georgia, Ga. Code Ann. § 17-7-93, Hawaii, Haw. Rev. Stat. § 802E-2, Maryland, Md. Rule 4-242, Massachusetts, Mass. Gen. L. ch. 278 § 29D, Minnesota, Minn. Rule Crim. Proc. 15.01, Montana, Mont. Code Ann. § 46-12-210, New Mexico, N.M. Cr. Form 9-406, New York, N.Y.Crim. Proc. Law § 220.50, North Carolina, N.C. Gen. Stat. § 15A-1022, Ohio, O.R.C. § 2943.031, Oregon, Or.Rev.Stat. § 135.385, Texas, Tex. Crim. Proc. Code Ann. § 26.13, Washington, Wash.Rev.Code Ann. § 10.40.200, Wisconsin, Wis. Stat. Ann. § 971.08, and the District of Columbia, D.C. Code 1981 § 16-713.

See e.g People v. Padilla, 151 Ill.App. 3d 297, 104 Ill.Dec. 522, 502 N.E.2d 1182, 1186 (1986). A number of these States have made explicit findings that aliens are often unaware of deportation consequences when pleading guilty or nolo contendere and that fairness demands that aliens be made aware of deportation consequences. After all, deportation of a person from the United States often is just as harsh as other consequences, if not more so.

Rather than parse over insignificant distinctions between collateral versus direct consequences of a guilty plea, these States simply state a compelling fundamental proposition: It is unfair to hold an alien to a guilty plea that will result in deportation when the alien is ignorant or misinformed on that point. Furthermore, the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel "should fully advise the defendant of these consequences." 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed. 1982).

In People v. Superior Ct. of City & Cty of San Francisco, 523 P.2d 636 (1974), in a case where neither the defendant, his attorney, the prosecutor and the court were aware that deportation would be a collateral consequence of the defendant's guilty plea, the California Supreme Court held that it was within the discretion of the trial court to permit the withdrawal of the plea of guilty on the ground that defendant did not realize at the time he entered the plea that deportation would be a consequence thereof because had the defendant been aware of that consequence, he would not have bargained for his freedom on probation in exchange for his concession of guilt.

The California Supreme Court stated that it was not

holding that the defendant was entitled as a matter of right to be advised of such collateral consequence prior to the acceptance of his plea, but instead held that a trial court, in the exercise of its discretion directed to the promotion of justice and to bring about a just result may take into consideration such material matters with which an accused was confronted and as to which he made erroneous assumption when he entered a guilty plea.

The California Supreme Court went on to say that "[t]he Court might consider that justice would not be promoted if an accused, willing to accept a misdemeanor conviction and probationary status, can not by timely action revoke his election when he thereafter discovers that much more serious sanctions, whether criminal or civil, direct or consequential, may be imposed." Id. As a general rule in California, a plea of guilty could be withdrawn "for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment." Id. There, the dire consequence of deportation, in addition to any punishment the court might impose, resulting from the plea of guilty overreached the defendant's free and clear judgment. As the defendant was not aware of the dire consequence of deportation, he was not placed in a position to gamble on the severity of possible penalties. Because the accused entered his plea without knowledge of or reason to suspect severe collateral consequences, the court properly concluded that justice required the withdrawal of the plea.

The Supreme Court of Florida, in Florida v. Seraphin, _____ So.2d _____, No. SC01-1344 (May 16, 2002), held that in order for a defendant to obtain postconviction relief based on a rule 3.172(c)(8) violation, the defendant had to prove that the trial court did not

provide advice regarding the possible immigration consequences of the plea and resultant prejudice. The Supreme Court of Florida went on to acknowledge that in order to show prejudice pursuant to a rule 3.172(c)(8) violation, defendants had to establish that they did not know that the plea might result in deportation, that they were threatened with deportation because of the plea, and that had they known of the possible consequences, they would not have entered the plea.

It is clear that if Montalban had been tried in any of these other states, instead of Louisiana, he would have been adequately warned of the immigration consequences of his guilty plea. This is clearly an important question of federal law that has not been, but should be, settled by this Honorable Court in order to promote uniformity.

II. Conflict between the federal circuits and United States Court of Appeals deciding important federal questions in a way that conflicts with the decisions of State Courts of last resort

In U.S. v. El-Nobani, 145 F.Supp.2d 906 (N.D. Ohio 2001), a legal permanent resident of the United States, after pleading guilty and sentenced to two years probation, sought to vacate his plea and to set aside his conviction because his plea was not knowing, voluntary and intelligent. Defendant argued that his plea was not knowing, voluntary and intelligent because he was not aware that his plea would automatically lead to his deportation. These facts are almost identical to the facts of the matter at hand. However, unlike in the present matter, where the prosecutor clearly knew of the immigration consequences of the plea by Montalban, yet failed to notify Montalban of such immigration consequences, and, in fact,

notified INS of the conviction in order to ensure the detention of Montalban and the initiation of removal proceedings against him after his plea, in El-Nobani, neither the defendant, his attorney, the prosecutor, nor the Court had any knowledge or suspicion that the defendant's plea would subject him to automatic deportation.

In El-Nobani, the defendant did know that his plea may have immigration consequences, but believed he would be eligible for discretionary relief from deportation, instead of being summarily deported. El-Nobani knew that his plea would affect his immigration status, but was not aware of the changes in the law. On the contrary, in the present matter, Montalban had no knowledge whatsoever that his plea would affect his immigration status in any way at all. If El-Nobani was found to have shown cause and prejudice to vacate his conviction, clearly Montalban has. Montalban's cause is that he reasonably did not know that he would be deported for his offense. His prejudice is that, if he had known that the plea would result in automatic deportation, he would not have pled guilty.

The Court, in El-Nobani, held that the defendant's plea must be vacated as Rule 11 of the Federal Rules of Criminal Procedure requires district court judges to warn alien defendants of the deportation consequences of their guilty pleas. The Court stated "[s]ince the Court failed to so warn El-Nobani and since he had no independent knowledge of those consequences, El-Nobani's plea must be vacated as it was not made knowingly, voluntarily, and intelligently."

The Court, in El-Nobani, reasoned that prior to

Congress dramatically altering the landscape of immigration law in 1996, legal alien residents who had committed deportable offenses could apply for discretionary relief from deportation. However, the changes in immigration law in 1996 changed all of that in the sense that presently there is virtually no relief from deportation under the current state of the law when a legal alien resident pleads guilty to a deportable offense. This Honorable Court acknowledged this change in immigration law in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001).

This ruling in the federal Sixth Circuit is in conflict with other federal Circuit Courts (which themselves have decided the important federal questions raised by the present writ of certiorari in a way that conflicts with the decisions discussed above of the state courts of last resort in California and Florida) that have held that district court judges are not required to inform alien defendants of the deportation consequences of their pleas, because deportation is a collateral consequence of pleading guilty.[2] In reaching this conclusion, these courts have generally relied on at least one of two propositions: first, that deportation is not directly part of a defendant's punishment or sentence; and/or second, that deportation is controlled by another agency over which the trial judge has no control.

However, as stated by the Court in El-Nobani,

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[2]See United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Romero-Vilca, 850 F.2d 177 (3rd Cir. 1988); United State v. Campbell, 778 F.2d 764 (11th Cir. 1985); Kincade v. United States, 559 F.2d 906 (3rd Cir. 1977); Michel v. United States, 507 F.2d 461 (2nd Cir. 1974).

deportation is now a direct and inevitable consequence of a conviction for resident aliens in almost all specific cases in light of the dramatic changes in immigration law virtually eliminating any discretion by INS in deportation/removal proceedings. Unlike under the earlier immigration law, where deportation was rarely a direct result of conviction because the determination of deportation was within the discretion of INS, the conviction now is the direct result of deportation because INS has no discretion. Deportation upon conviction is now automatic.

This Honorable Court itself has said that "... there is a clear difference between facing possible deportation and facing certain deportation." INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001). "It can no longer be claimed that deportation is a consequence that will be determined by an agency outside of the trial court's control." U.S. v. El-Nobani, 145 F.Supp.2d 906, 914 (N.D. Ohio 2001). After all, the trial court's actions make deportation inevitable under the existing immigration law. To make matters worse, the new immigration laws have gone so far as to surprisingly expand the definition of aggravated felony to include less serious and non-violent crimes that previously were not considered aggravated felonies, extending the application of this issue to numerous additional individuals.

In St. Cyr, supra, this Honorable Court stated that the class of aliens whose continued residence in this country has depended on their eligibility for discretionary relief from deportation is extremely large, and not surprisingly, a substantial percentage of their applications for relief have been granted. Considering the now automatic nature of deportation proceedings based on convictions, deportation can no longer reasonably be

considered merely a collateral consequence of an alien's guilty plea. The holdings of the other federal Circuit Courts which conflict with the El-Nobani decision relied upon precedent that was derived at a time when an alien's conviction did not automatically lead to deportation.

The Court, in El-Nobani, went on to take judicial notice of "the fact that deportation consequences are often of far greater concern for legal aliens than any prison sentence they might receive." Although deportation is technically not a punishment, it is well recognized that this distinction is technical in nature and that deportation does have the substantive aspects of punishment.[3] Further, as stated in El-Nobani, while it can be said that deportation is not directly part of a defendant's sentence, deportation clearly has every other quality of a punishment, in light of the changes in immigration law. ". . . [D]eportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation." Jordan v. DeGeorge, 71 S.Ct. 703. 714 (1951). "Indeed, as already discussed, deportation is often a more severe punishment than any

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[3]See e.g. Galvan v. Press, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954) (commenting that the "intrinsic consequences of deportation are so close to punishment for crime"); Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 Le.Ed. 905 (1893) (Brewer J., dissenting) ("Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that often times most severe and cruel."); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948) (deportation is "a penalty" and "a drastic measure and at times the equivalent of banishment or exile.").

sentence imposed by the court and, since deportation is now automatic for a whole host of minor crimes, it will likely be a significantly harsher punishment than the judge's sentence in many, if not most, cases in the future." U.S. v. El-Nobani, 145 F.Supp.2d 906, 915 (N.D. Ohio 2001).

Therefore, holding that deportation is not a direct consequence of conviction, solely on the basis that it is technically not a punishment imposed by the court, is a semantical parsing of form over substance. After all, "[d]eportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has acquired residence here. Delgadillo v. Carmichael, 68 S.Ct. 10 (1947).

This is obviously an important question of federal law that has not been, but should be, settled by this Honorable Court in order to promote uniformity. After all, even though some federal district courts believe that the law does not require a court to advise defendants of the immigration consequences of a plea for the plea to be considered knowing and voluntary, those same federal district courts, in practice, do advise defendants of the possibility that , if they are not citizens, their conviction could lead to their deportation before accepting a guilty plea. See Acevedo v. Greiner, (S.D.N.Y. 2001).

In fact, the Court in U.S. v. Amador-Leal, 276 F.3rd 511 (9th Cir. 2002), stated that although immigration consequences are a collateral consequence of a plea and the resulting conviction, and the district courts are not constitutionally required to warn defendants about potential removal in order to assure voluntariness of a plea, it does not mean that the district courts should not do so. The Court in Amador-Leal, expounded that:

> Many district judges comment in their Rule 11 Colloquy that a plea of guilty and resulting conviction may affect an alien's status in this country, and inquire whether the defendant understands the possible immigration consequences of his plea. Although not required by Rule 11 or due process, we commend this sort of dialogue for there is no question that immigration consequences of a conviction are important to aliens contemplating a plea.

This Honorable Court now has an opportunity to resolve the conflicts within and between the states and the federal circuits by adopting the simple solution of requiring courts, state and federal, to advise defendants of the immigration consequences of their pleas of guilty in the colloquy between the courts and the defendants. This is the most reliable manner in which to protect the constitutional rights of this class of individuals, and the easiest solution to implement.

In INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001), this Honorable Court acknowledged that plea agreements involve a *quid pro quo* between a defendant and the government and that the potential for unfairness to legal aliens is significant and manifest. This is especially true if the resident alien considering whether to enter into a plea agreement with the government is not acutely aware of the conviction's immigration consequences.

III. Montalban's guilty plea was not knowingly, voluntarily and intelligently entered

Before entering a guilty plea, the defendant must be advised of, and must waive, his constitutionally guaranteed right to a jury trial, right of confrontation, and right against compulsory self-incrimination. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); State ex rel. Jackson v. Henderson, 260 La. 90, 255 So.2d 85 (1971). Even more importantly, however, the entry of a guilty plea must be knowing and voluntary on the defendant's part. State v Nuccio, 454 So.2d 93 (La. 1984); Kennedy v. Maggio, 725 F.3rd 269 (5th Cir. 1984); State v. Hill, 714 So.2d 814 (La. App. 2nd Cir. 1998). Due process dictates that a guilty plea be the voluntary choice of an informed accused. Advising the defendant of certain facts beyond the Boykin 'triad of rights" bears on the knowing and voluntary nature of the plea. State ex rel. LaFleur v. Donnelly, 416 So.2d 82 (La. 1982).

While an understanding of the triad of rights may amount to the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always inure the intelligent and voluntary nature of the plea. See, e.g., State of Galliano, 396 So.2 1288 (La. 1981); State v. Beatty, 391 So.2d 828 (La. 1980); State v. Halsell, 403 So.2d 688 (La. 1981).

It is important that the accused be aware of the consequences of entering a plea to the charges against him pursuant to a plea bargain agreement. This is necessary for the defendant to make an informed decision about whether to plead guilty under the circumstances. After all, the defendant may be far more concerned about the

possibilities of having his freedom while on probation, then being concerned about any abstract right to confront his accusers at trial. The defendant may prefer the certainty surrounding a plea bargain agreement than the uncertainty of a trial on the merits to prove his innocence. In other words, a defendant may be willing to trade off his constitutional rights for the certainty of a plea bargain agreement. This trade off, however, is fair only if the defendant is given all of the necessary information required for him or her to make an informed decision.

The law is clear that compliance with the three-right articulation rule of State ex rel Jackson v. Henderson, above, alone, is not the equivalent of a constitutionally valid guilty plea. A guilty plea which complies with the per se rule of Jackson, but which does not comply with Boykin's constitutional mandate that the plea must be entered knowingly and intelligently, is an invalid guilty plea.

Here, Montalban was not made aware by his counsel, the prosecutor or the Court that he would be subject to removal by INS if sentenced to over one year imprisonment if convicted of the felony charges brought against him by the District Attorney, as Montalban is not a citizen of the United States, but instead is a legal resident originally from Costa Rica. Montalban did not have any personal knowledge or familiarity with the immigration laws of this Country at the time he entered his plea agreement.

As a result of his guilty plea, Montalban is presently being held at a federal detention center in Louisiana and facing removal proceedings. If Montalban had been made aware by his counsel, the prosecutor or the Court that he

would be subject to detention by INS and subject to immigration removal proceedings as a result of his conviction and sentence under the plea agreement, he certainly would not have plead guilty. Therefore, his plea was not knowingly, voluntarily and intelligently entered. See State v. Jones, 398 So.2d 1049 (La. 1981). Hence, the Louisiana Court of Appeal, Fifth Circuit, was correct in vacating Montalban's plea. After all, Montalban's plea was not a voluntary choice as he was not properly informed by his counsel, the prosecutor or the Court of all of the legal consequences of the plea.

The law provides that advising the defendant of certain facts beyond the Boykin 'triad of rights" bears on the knowing and voluntary nature of the plea. State ex rel. LaFleur v. Donnelly, 416 So.2d 82 (La. 1982). Clearly, Montalban could not make a knowing and voluntary decision to enter into a plea agreement that would, without a doubt, automatically lead to his deportation, if he was not first advised of that fact.

This case clearly shows that other factors do have a bearing on the validity of a plea because a mere recitation of rights to Montalban did not inure the intelligent and voluntary nature of his agreement to the plea bargain. Considering his immigration status, it was important to Montalban that he be made aware of the immigration consequences of entering a plea of guilty to the charge against him pursuant to the relevant plea bargain agreement. This was necessary for Montalban to make an informed decision about whether to plead guilty under the circumstances and forego, or waive, his constitutional rights in the process. Surely, Montalban would not have entered the plea if he had known that deportation was sure to follow. A defendant must be made aware of all of

the legal consequences of a guilty plea before that defendant can make an informed decision to plea guilty under any plea agreement, waiving his or her constitutional rights.

Compliance with the three-right articulation rule of State ex rel Jackson v. Henderson, above, alone, was not the equivalent of a constitutionally valid guilty plea because Montalban was not put into a position where he could make a voluntary, knowing, intelligent, and informed decision. As Montalban's plea was not entered knowingly, voluntarily and intelligently, the plea was constitutionally invalid.

Montalban's guilty plea was not intelligently, voluntarily and knowingly entered as contemplated by this Honorable Court in Boykin v. Alabama, supra. After all, Montalban lacked important and relevant information which would have factored into his decision of whether to enter the guilty plea. Montalban's knowledge of the consequences of his plea is important to the question of whether his plea was knowingly, voluntarily and intelligently entered.

In State v. Jones, 404 So.2d 1192 (La. 1981), the Louisiana Supreme Court stated that a guilty plea is not valid unless the accused has a full understanding of what the plea connotes and of its consequence. The Louisiana Supreme Court, in Jones, went on to state that ". . . a waiver is valid only if voluntarily and knowingly made" and that "[t]he constitutional validity of the plea is ultimately determined by the overall circumstances of each case." The Louisiana Supreme Court, in State v. Richard, 00-0659 (La. 9-29-00), 769 So.2d 1177, also stated that ". . . the validity of any guilty plea depends upon the

circumstances of each case." See also, State v. Filer, 00-0073 (La. 6-30-00) 762 So.2d 1080, (Louisiana Supreme Court held that "... the knowing and intelligent waiver of the defendant's rights depends upon the circumstances of each case").

It appears that the District Attorney's Office would simply like to use its knowledge of immigration laws to ensure that uninformed resident aliens are indefinitely detained and automatically deported by INS after their plea of guilty, to satisfy the ultimate ends and goals sought by the District Attorney's Office. It is clear from the case law cited by the State in its writ application to the Louisiana Supreme Court that the District Attorney's Office is well aware of the immigration consequences of certain pleas. As such, prosecutors can essentially trick an alien by utilizing the plea bargaining process to make the alien believe his guilty plea is favorable to avoid the risks inherent in the criminal justice system, duping the defendant into waiving his or her constitutional rights in the process, only to find out later that he or she locked his or her fate to be indefinitely detained and automatically deported by INS, according to the prosecutors' expectations. It is clearly in the interest of justice to vacate such pleas.

The defendants who plea bargain in good faith with the District Attorney's Office in return will face indefinite detention and automatic deportation by INS. All the while, the prosecutor, through negotiating a plea bargain in bad faith, skirts its responsibilities to meet its burden of proof with respect to charges brought against defendants. This is even more offensive when one considers that the class of defendants involved are non-citizens unfamiliar with our criminal justice system.

This Honorable Court, in INS v. St.Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001), stated that the potential for unfairness to legal aliens is significant and manifest. Here, the prosecutors, well aware of immigration consequences of a plea, did not disclose the information to Montalban, got the benefit of the plea agreement, and then simply picked up the telephone and called INS to ensure the detention and deportation of Montalban. This is contrary to considerations of fair notice, reasonable reliance and settled expectations. Such abuse by a prosecutor, or retribution against unpopular groups or individuals, must be checked by requiring the Court to advise a defendant of the immigration consequences of a plea of guilty.

Both immediately after Montalban entered his plea of guilty and immediately after the Louisiana Supreme Court reinstated his vacated conviction, it was the prosecutor's office that notified INS, causing Montalban's detention and INS's initiation of deportation proceedings. Montalban negotiated for and was promised his freedom in the form of probation rather than incarceration through a plea bargain agreement with the State. Instead, due to the actions of the prosecutor, he got indefinite detention by INS and inevitable deportation, which essentially amounts to exile and banishment from this country. This clearly violates elementary considerations of fairness.

The relevant plea agreement herein did not involve a quid pro quo between Montalban and the State because the State was aware of, and used against Montalban, information that it failed to disclose to Montalban prior to his plea. Montalban, in exchange for the perceived benefit of not risking possible incarceration, waived several of his fundamental constitutional rights, including his right to a trial. The State, through Montalban's agreement to plead

guilty, was granted numerous tangible benefits, such as promptly imposing punishment without the expenditure of prosecutorial resources. However, the State, all along, intended to notify INS that Montalban was now deportable as a result of the conviction and sentence in order to have him detained and deported, in bad faith and in material and substantial breach of its plea bargain agreement with Montalban.[4]

The State basically pulled an end run around its plea agreement with Montalban, undercutting the essence of the plea agreement and depriving Montalban of the benefit of his bargain, rendering the plea bargain agreement fundamentally unfair. "Essentially any violation of a prosecutorial promise triggers considerations of fundamental fairness and is a deprivation of due process." Santobello v. New York, 404 U.S. 257, 262 (1971). The State accomplished by indirect means what it promised not to do directly. Montalban, if he had been advised of the immigration consequences of his plea of guilty, clearly would have factored this information into deciding whether to plead or proceed to trial.[5] To him, preserving his right to remain in the United States was more important than any potential short jail sentence. This is evidenced by the fact that Montalban, even though he has already served his complete sentence, is seeking to

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[4]See State v. Williams, 624 N.W. 2d 164 (2002), for an analysis by the Supreme Court of Wisconsin of a breach of plea agreement case.

[5]See Magana-Pizano v. INS, 200 F.3d 603, 612 (CA9 1999), wherein the Court states: "That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented."

have the conviction vacated, taking a chance of subjecting himself to a trial on the same offense, the result of which, unless the jury acquits him, he will be sentenced anew, so that the sentence he served will count for nothing. All to avoid being deported.

The State, through its trickery, has secured a life sentence of exile and banishment upon Montalban, a punishment which was well beyond the Court's jurisdiction to impose. The prosecutor's interest, as an officer of the court, is to see that justice shall be done. A prosecutor may strike hard blows but not foul ones. Here, the prosecutor struck Montalban below the belt.

Essentially, Montalban, because he is an alien, and not a citizen, is receiving unequal treatment from the criminal justice system. Because Montalban is an alien, he is being punished with a life sentence of banishment and exile in addition to the punishment which a citizen would suffer for the identical act. Requiring the Court to notify the defendant of the potential immigration consequences of a guilty plea will provide uniformity and equal protection of the law. A resident alien, just like a citizen, is entitled to due process of law. Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616.

If Montalban were a citizen, his sentence would be served and his punishment ended pursuant to the plea agreement. However, where a resident alien, such as Montalban, is not advised of the immigration consequences of the guilty plea, because of his alienage, after serving his sentence, or even during the duration of his sentence, he will begin a life sentence of exile from what has become home and of separation from his established means of livelihood for himself and his family.

This is a savage penalty resulting in ". . . loss of both property and life, or of all that makes life worth living, Ng Fung Ho. V. White, 42 S.Ct. 492, , 495 (1922), essentially amounting to cruel, excessive and unusual punishment, and due process of law requires standards for imposing it as definite and certain as those for conviction of crime.

IV. Ineffective assistance of counsel

The Sixth and Fourteenth Amendments of the United States Constitution guarantee the defendant in a state criminal proceeding assistance of counsel for his defense. This Honorable Court has held that the right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). In outlining the convicted defendant's burden of proof in an ineffective assistance case, this Honorable Court has established a two-part test. The first prong of the test examines whether the attorney violated some duty to the client. That is to say that the counsel's performance was deficient. The second prong of the test requires a showing of prejudice, resulting from defense counsel's deficient performance, without which the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Although Montalban's counsel advised him of certain constitutional rights, his counsel failed to advise him of the immigration consequences of his plea. Thus, the assistance provided by his counsel was ineffective. Counsel violated the duty owed to Montalban to advise him fully of all of the possible legal consequences of pleading guilty under the circumstances, including deportation. Counsel's deficient performance resulted in

a prejudice to Montalban because, without the defense counsel's omission, the result of the proceedings would have been different. If Montalban would have been advised by his counsel that the plea would certainly subject him to detention and deportation, he clearly would not have accepted the terms of the plea agreement.

An attorney must render competent service. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). A lawyer must actually and substantially assist his client in deciding whether to plead guilty. Id. It is the attorney's job to provide the accused an understanding of the law in relation to the facts. Id. The attorney's advice should permit the accused to make an informed and conscious choice. Id. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea can not be knowing and voluntary because it will not represent an informed choice. Id.

A lawyer who is not familiar with the facts and law relevant to his or her client's case can not meet that required minimal level. Id. Here, considering Montalban's attorney failed to inquire about Montalban's immigration status and advise Montalban of how his immigration status may be affected by the plea of guilty, Montalban's attorney clearly was not familiar with the facts and law relevant to the case. Therefore, Montalban's attorney did not meet the required minimal level, making certain that Montalban's plea could not be knowingly, voluntarily and intelligently entered.

RELIEF REQUESTED

WHEREFORE, this Honorable Court is urged to grant a Writ of Certiorari, vacate the ruling of the Louisiana Supreme Court, and reinstate the ruling of the Louisiana Court of Appeal, Fifth Circuit, vacating Montalban's guilty plea, conviction and sentence.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ARNOLDO MONTALBAN
Petitioner

versus

STATE OF LOUISIANA
Respondent

_____

APPENDIX

1. February 26, 2002 Ruling of the Louisiana Supreme Court

2. June 27, 2000 Ruling of the Louisiana Court of Appeal, Fifth Circuit

3. Transcript of May 26, 2000 Ruling by the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana

4. September 18, 2000 Denial of Rehearing by the Louisiana Court of Appeal, Fifth Circuit

SUPREME COURT OF LOUISIANA

No. 2000-KP-2739

STATE OF LOUISIANA

versus

ARNOLDO MONTALBAN

FEB 26 2002

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

KNOLL, Justice*

This case involves the question of whether the defendant, Arnoldo Motalban, can withdraw his guilty plea to aggravated criminal damage to property, a felony, because he alleges that his defense counsel did not advise him that his plea could subject him to deportation by the United States Immigration and Naturalization Service. For the following reasons, we find that possible deportation is a collateral consequence of the defendants guilty plea and need not be explained as a requirement for a valid guilty plea. We further find that neither prong of the test articulated in Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984), is met, thus obviating the need to remand for a determination of the effectiveness of counsel.

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* Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, participating in the decision.

Appendix 1

FACTS

The defendant, who is nineteen years of age and native of Costa Rica, moved to the United States at the age of three, and has resided in this country ever since. On November 15, 1999, the defendant pleaded guilty to aggravated criminal damage to property, a violation of LA. REV. STAT. ANN. § 14.55.[1] The trial court sentenced the defendant to three years imprisonment, but suspended the sentence and placed him on active probation for three years. On April 24, 2000, the defendant filed a motion in the trial court seeking to vacate his guilty plea. In his motion, the defendant alleged that he entered the guilty plea unknowingly and unvoluntarily, contending that his counsel did not inform him that his plea could result in his deportation.[2] The defendant further contended that

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[1] LA. REV. STAT. ANN. § 14.55. Provides as follows:

> Aggravated criminal damage to property is the
>
> intentional damaging of any structure, watercraft, or movable, wherein it is foreseeable that human life might be endangered, by any means other than fire or explosion.
>
> Whoever commits the crime of aggravated criminal damage to property shall be fined not more than ten thousand dollars, imprisoned with or without hard labor for not less than one nor more than fifteen years or both.

[2] Under 8 U.S.C. 1227 (a)(2)(A)(iii) and 8 U.S.C. 1227 (a)(2)(A)(II) an alien may be deported when he/she has

because of these deficiencies he received ineffective assistance of counsel. The trial court denied the defendant's motion, finding that defendant understood the Boykin form that he signed and that defendant, who had lived most of his life in the United States, could have avoided the possibility of deportation if he had become a United States citizen.

On application for supervisory writs, the Court of Appeal, Fifth Circuit, granted the writ application and vacated defendant's guilty plea. It reasoned that "the failure to inform the defendant of the possibility of deportation precluded the entry of a knowing and intelligent plea." State v. Montalban, 00-1257 (La. App. 5 Cir. 6/27/00). We granted the State's writ application. State v. Montalban, 00-2739 (La. 9/21/00), 797 So. 2d 54.

DISCUSSION

The defendant argued that his guilty plea should be vacated because it was entered unknowingly and unintelligently without knowledge that entry of his guilty plea could precipitate deportation. He further contended that he received ineffective assistance of counsel because his attorney failed to inform him of the deportation consequences. To the contrary, the State contends that neither state nor federal law requires that a defendant be advised that deportation may be a collateral consequence of the guilty plea.

The entry of a guilty plea must be a free and

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been convicted of a crime that carries a possible sentence of more than one year.

voluntary choice on the defendant's part. State v. Nuccio, 454 So. 2d 93 (La. 1984). Due process requires that pleas of guilty be voluntary and intelligent relinquishments of known rights. The court must make an independent determination of whether the defendant's plea is made knowingly and intelligently through a colloquy wherein the defendant is questioned about his decision and the constitutional rights he is waiving. State v. Age, 417 So. 2d 1183 (La. 1982). A court may not set aside a guilty plea after sentence is imposed unless the plea is constitutionally deficient. State v. Smith, 406 So. 2d 1314, 1315 (La. 1981).[3]

For a guilty plea to be valid, there must be a showing that the defendant was informed of and waived his constitutionally guaranteed right to trial by jury, right of confrontation, and right against self-incrimination.

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[3]There is a fundamental societal and judicial interest in the finality of guilty pleas. As noted in United States v. Timmreck, 441 U.S. 780 (1979):

> "'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'"

Timmreck, 441 U.S. at 784 (quoting United States v. Smith, 440 F.2d 521, 528-29 (7 Cir. 1971).

Boykin v. Alabama, 395 U.S. 238 (1969); State ex rel. Jackson v. Henderson, 255 So. 2d 85 (La. 1971). In addition, LA. CODE CRIM. PROC. ANN. art. 556.1 requires [4] the trial court to inform the defendant of:

> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.
>
> (2) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if financially unable to employ counsel, one will be appointed to represent him.

This court has already stated that the possible change in immigration status is a collateral consequence of a guilty plea that does not render the plea involuntary. State v. Tran, 2000-2471 (La. 6/1/01), 793 So. 2d 172, 173, relying on United States v. Osiemi, 980 F.2d 344, 349 (5th Cir. 1993) and State v. Figueroa, 639 A. 2d 495 (R.I. 1994).

A collateral consequence is not related to the length of sentence imposed under the plea agreement. United States v. Romero- Vilca, 850 F. 2d 177 (3rd Cir. 1988). See,

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[4] In State v. Guzman, 99-1528 (La. 5/16/00), 769 So. 2d 1158, we nevertheless recognized that harmless error analysis was applicable in an instance where the trial court failed to inform the defendant before accepting his guilty plea about the mandatory minimum sentence and that convition could be used to enhance the penalty for subsequent offenses.

e.g., loss of the right to vote, LA. CONST. ANN. ART.1, § 10(B)(1)(2), and denial of the right to hold a commission in the armed services.[5] As applicable herein, deportation is the result of a separate civil administrative proceeding, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 8 U.S.C. 1227(a)(2)(A)(II), not a consequence that the sentencing judge imposes as part of the guilty plea. Michel v. United States, 507 F.2d 461 (2nd Cir. 1974). Because deportation is a collateral consequence of a guilty plea, it was unnecessary for defense counsel to explain the possibility to the defendant to insure that the guilty plea was free and voluntary. See Osiemi, 980 F.2d at 349; United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985); United States v. Banda, 1 F.3rd 354 (5th Cir. 1993); Figueroa, 639 A.2d at 499 (R.I. 1994).

Although this Court has emphasized the importance of a defendant's knowing the maximum penalty that may result from his pleading guilty, the two primary cases the defendant relies upon for that proposition, State ex rel LaFleur v. Donnelly, 416 So.2d 82 (La. 1982) and State ex rel. Curry v. Guillory, 441 So.2d 204 (La. 1983), can be factually distinguished. In LaFleur, we found that defendant's guilty plea was not knowingly and intelligently entered because his attorney misinformed him of his parole eligibility. Similarly, in Curry, we allowed a defendant to withdraw his guilty plea because his attorney

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[5]To hold otherwise would open Pandora's box and would expose future defense counsel to claims of ineffective assistance under a variety of instances which involve collateral consequences. In additional to those referenced above, a like result may involve inability of a felon to hunt because of firearm restrictions, holding public office, eligibility to perform jury duty, ineligibility for certain employments.

mistakenly informed him of the maximum sentence. Unlike those two cases which involved information directly related to the sentence imposed, "deportation . . . [is] not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility." Michel, 507 F.2d at 465.

In Strickland, the United States Supreme Court set out a two-prong test for proving ineffective assistance of counsel. Strickland, 466 U.S. 668. Under Strickland, for a defendant to establish that he received ineffective assistance fo counsel, he must show (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694. In addition to proving that defendant's attorney's representation fell below the standard of reasonableness, it is incumbent upon the defendant in the context of a guilty plea to show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also State v. Washington, 491 So.2d 1337, 1338-39 (La. 1986).

In the present case, defense counsel's representation did not fall below an objective standard of reasonableness as required under Strickland. As enunciated above, it was unnecessary for defense counsel to explain to the defendant that the possibility of deportation existed to insure that the guilty plea was free and voluntary because deportation is a collateral consequence of a guilty plea. Accordingly, the defendant has failed to show that defense

counsel's representation fell below an objective standard of reasonableness as required under Strickland.

Moreover, a reasonable probability did not exist, as required in Hill, that, but for defense counsel's failure to advise of deportation, the result of this criminal proceeding would have been different. As a result of this plea bargain agreement, the defendant avoided a potential fine of not more than $10,000 and/or imprisonment of not more than 15 years. Instead, the defendant benefitted from his plea agreement and received a substantially less onerous punishment, i.e., a suspended three year sentence and three year period of probation. Under the provisions of 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 8 U.S.C. 1227(a)(2)(A)(II), defendant's conviction of a crime that carried a *possible* sentence of more than one year alone raised the specter of deportation.

DECREE

For the foregoing reasons, we reverse the decision of the Court of Appeal, Fifth Circuit. In accordance with our determination hereinabove, we reinstate the trial court's denial of defendant's motion to vacate his guilty plea.

REVERSED

JOHNSON, J. DISSENTS
CALOGERO, CJ DISSENTS AND ASSIGNS REASONS

SUPREME COURT OF LOUISIANA

No. 2000-KP-2739

STATE OF LOUISIANA

versus

ARNOLDO MOTALBAN

FEB 26 2002

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

CALOGERO, Chief Justice dissents and assigns reasons.

While I agree with the majority that deportation is a collateral consequence of defendant's pleading guilty, I would remand this case to the district court to conduct an evidentiary hearing based on the effectiveness of the defendant's counsel. Under the Sixth Amendment to the United States Constitution, defendants are guaranteed the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55; 77 L.Ed.2d 158 (1932). The United States Supreme Court recognized the right to the effective assistance of counsel in relation to the entering of a guilty plea in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). Similarly, this court stated in State v. Beatty, 391 So. 2d 828, 831 (La.1980) "When a defendant enters a counseled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside." We characterized the counsel's role at the guilty plea stage as "absolutely critical in assuring

that the defendant is able to weigh his options intelligently." Id. Furthermore, several courts have held that an attorney has a duty to advise a client of the immigration consequences of a guilty plea. See Wallace v. Reno, 24 F.Supp. 2d 104, 110 (D. Mass 1998); Mojica v. Reno, 970 F.Supp. 130, 177 (E.D.N.Y. 1997); People v. Pozo, 746 P.2d 523, 529 (Colo. 1987); Williams v. State, 641 N.E.2d 44, 48-49 (Ind. Ct. App. 1994).

The United States Supreme Court set out the standard for proving ineffective assistance of counsel in a two-prong test in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). According to Strickland, for a defendant to show that he received ineffective assistance of counsel, he must show 1) "counsel's representation fell below an objective standard of reasonableness" and 2) "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694. The United States Supreme Court applied this standard in the context of a guilty plea in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). In addition to proving unreasonable performance, the defendant must also show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This court adopted the Strickland and Hill tests in State v. Washington, 491 So. 2d 1337, 1338-39 (La. 1986).

In analyzing the first prong of the Strickland test, whether defendant's attorney's representation fell below the standard of reasonableness, it is important to note that this court has emphasized the importance of a defendant's knowing the maximum penalty that may result from his

pleading guilty. In State ex rel. LaFleur v. Donnelly, 416 So. 2d 82, (La. 1982), this court recognized that, while it is important to explain to the accused the elements of the offenses of which he is charged, as well as the rights he will waive by pleading guilty, it is probably more important to the defendants' decision to plead guilty that he understand maximum penalty exposure. Id. at 84. In LaFleur, defendant's attorney erroneously informed him that if he pled guilty and accepted a six year plea bargain, he would be eligible for parole after two years. This court found that defendant was justified in believing that he would be eligible for parole in two years and that he pleaded guilty based in part on that misconception. As a result, while defendant's guilty plea was voluntary, it was not knowingly and intelligently entered. Id.

Furthermore, in State ex rel. Curry v. Guillory, 441 So. 2d 204 (La. 1983), this court remanded a defendant's case to the district court, allowing him to withdraw his guilty plea because his attorney advised him to enter the plea under the mistaken impression that defendant would serve a maximum of two-years. In reality, the plea would have automatically caused revocation of his parole on a prior conviction, and caused the need to serve an additional eight years in prison.

The reasonableness of an attorney's representation is a question of fact to be determined on a case-by-case basis. In analyzing the reasonableness of the representation, a court should consider whether defendant's counsel knew or should have known that deportation was a serious concern of the client's, and should also consider the attorney's treatment of that concern when advising his client, including whether the attorney failed to provide his client with information or,

on the other hand, provided his client with incorrect information. However, because the reasonableness of defendant's attorney's representation is a fact-intensive question, and this defendant has not had the opportunity to present evidence relating to this issue,[1] I would remand this case to the district court to conduct an evidentiary hearing and to determine whether defendant's attorney's representation fell below a standard of reasonableness.

Furthermore, according to the second prong of the Strickland and Hill tests, a finding that defendant's attorney's representation fell below the standard of reasonableness does not render the attorney's performance constitutionally ineffective absent a finding of prejudice to the defendant. Based on this, in order to prove ineffective assistance of counsel, along with proving the unreasonableness of his attorney's representation, defendant also must prove that, had his attorney advised him of the possible deportation proceedings, he would not have pleaded guilty and would have insisted on going to trial.

Criminal defendants must consider multiple possible consequences before deciding whether to plead guilty or proceed to trial. Although the significance of the possibility of deportation may be different in every case, deportation may well be more severe than a prison sentence, or a suspended prison sentence as in this case, and may result in separation from family or in the "loss of

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[1]The trial court conducted a hearing on defendant's motion to vacate the guilty plea. However, no evidence was presented, and defendant was not present at the hearing because he was being held by the Immigration and Naturalization Service in Oakdale, Louisiana.

property or life; or of all that makes life worthwhile." Williams v. State, 641 N.E.2d 44,49 (Ind. App. 5 Dist. 1994); See also Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922).

In this case, defendant pled guilty to the crime with which he was charged, not to a lesser offense, and he received a bargained for suspended sentence of three years, with probation. The deportation consequence of his guilty plea may well, to him, have been more severe than the risk of a sentence of up to fifteen years, his maximum exposure.[2] Therefore, it is very possible that in this case, defendant may not have pleaded guilty had he known of the possibility of deportation. Accordingly, I would remand this case to the district court to also determine whether defendant would have pleaded guilty had his attorney advised him of the deportation that might follow his conviction.

For these reasons, I would vacate the judgment of the court of appeal and remand this case to the district court to conduct an evidentiary hearing, and determine whether under Strickland and Hill, defendant's guilty plea should be vacated based upon ineffective assistance of counsel.

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[2] Defendant, who was born in Costa Rica, moved to the United States at the age of three, and has resided in this country since that time.

Application for Writs

No. 00-KH-1257

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

JUNE 27, 2000

_____

_____

Clerk

STATE OF LOUISIANA

VERSUS

ARNOLDO MONTALBAN

IN RE ARNOLDO MONTALBAN

_____

APPLYING FOR SUPERVISORY WRITS FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, NUMBER 99-5422, DIRECTED TO THE HONORABLE ROBERT A. PITRE, JR., JUDGE DIVISION "G"

_____

Appendix 2

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WRIT GRANTED

The entry of a guilty plea must be knowing and voluntary on the defendant's part. *State v. Nuccio*, 454 So.2d 93 (La. 1984). We find the failure to inform the defendant of the possibility of deportation precluded the entry of a knowing and intelligent plea. Accordingly, we reverse the trial court's ruling and vacate the Defendant's guilty plea.
Gretna, Louisiana, this 28 day of July, 2000.

S/JUDGE SOL GOTHARD
JUDGE SOL GOTHARD

S/JUDGE EDWARD A. DUFRESNE, JR.
JUDGE EDWARD A. DUFRESNE, JR.

S/JUDGE MADELINE JASMINE
JUDGE MADELINE JASMINE, PRO TEMPORE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUSIANA

STATE OF LOUISIANA — NUMBER 99-5422

VERSUS

ARNOLDO MONTALBANO — DIVISION "G"

* * * * *

Proceedings taken in the above numbered and entitled cause before the Honorable Robert A. Pitre, Jr. on May 26, 2000

* * * * *

APPEARANCES:
Assistant District Attorney
for the State of Louisiana

Donald A. Rowan, Jr., Esq.

Attorney for the defendant:

Ivan Orihuela, Esq.

* * * * *

Reported by: LINDA E. LaBORDE, C.C.R.

Appendix 3

WITNESS INDEX

WITNESSES: PAGE NO.:

NONE CALLED

EXHIBIT INDEX

EXHIBITS RECEIVED:	DESCRIPTION	PAGE

PLAINTIFF'S EXHIBITS

NONE OFFERED

DEFENDANT'S EXHIBITS

NONE OFFERED

PROCEEDINGS

MR. ROWAN:

Judge, number 28 on the docket, Arnoldo Montalbano.

MR. ORIHUELA

Good morning Your Honor, Ivan Orihuela, on behalf of Arnoldo Montalbano. We're here today, Your Honor, on a motion to vacate a guilty plea and set aside the conviction and reopen the criminal proceedings.

It was my understanding that Mr. Montalbano was being held here but apparently he's been - - he's being detained by the Immigration and Naturalization Service in Oakdale, Louisiana. And he hasn't been brought down for this proceeding. I wasn't aware that he was sent back to INS. When I filed the motion he was being held here. But I am prepared to go forward with the motion, Your Honor.

THE COURT:

What's this motion for?

THE CRIMINAL CLERK:

Motion to vacate guilty plea and set aside conviction of sentence, Your Honor.

THE COURT:

When he pled he didn't plea under Article 893, it's not in the - - I don't see any grounds to set aside the plea.

MR. ORIHUELA

Your Honor, the grounds on which we're requesting that the Court reopen the proceedings and vacate the guilty plea, is essentially that the plea was not entered knowingly and intelligently, as required by law.

THE COURT

Well, you can argue the motion if you want.

MR. ORIHUELA:

Your Honor, Mr. Montalbano was - - pled guilty on November 15th, 1999 to aggravated criminal damage to property. He was sentenced to three years incarceration, suspended, and three years active probation. Thereafter, he was detained by the Immigration and Naturalization Service and subject to deportation proceedings in Oakdale, Louisiana.

His guilty plea was not knowingly and intelligently entered. The entry of a guilty plea must be knowing and voluntary on the part of the defendant. And this is why the Supreme Court requires the boykinization process. However , the Supreme Court of the United States also requires that the defendant be advised of the factors beyond the boykin rights in

bearing of the validity of his guilty plea. Hence, the law is clear that compliance only with the three rights articulation alone is not necessarily equivalent to a valid guilty plea. The most important ruling in a boykin decision is that the plea must be entered knowingly and voluntarily and intelligently by the defendant. Therefore, it's important that the defendant be aware of all the consequences of his guilty plea before his plea can be accepted as valid. This is necessary for the defendant to make an informed decision.

In this particular case Mr. Montalbano was not aware that entering a guilty plea would subject him to detention by the INS, and removal from this country as a result of the conviction and the sentence that he received. He did not know this when he entered his plea agreement. And this triggered the removal proceedings of his detention in Oakdale by the INS. And if the defendant had known of this particular consequence he would never have plead guilty under the plea agreement that was offered. Therefore, his guilty plea was not knowingly and intelligently entered.

In addition, Your Honor, if the guilty plea is kept in place then the sentence imposed upon the defendant would amount to cruel, excessive and unusual punishment. Both the United States Constitution and the Louisiana Constitution prohibit cruel, unusual and excessive punishment.

An excessive punishment is basically punishment which is grossly out of proportion with the crime. In this particular case the penalty would be

excessive despite the fact that it may be appropriate in other cases because of the circumstances surrounding this particular case. The sentence imposed on the defendant in this matter would effectively exile or banish the defendant from this country for the crime of aggravated criminal damage to property.

The defendant grew up in the United States since the age of three. He arrived in the United States in 1981 from Costa Rico. English is his first language. All of his immediate family and friends are here in the United States. All of his schooling took place in the United States and for all intent and purposes the United States is the only country that he calls home.

So the sentence imposed on him under the guilty plea pretty much ensures that he will be separated from his country and from his family. He is not a citizen of the United States, but he is a legal resident. And he has been here for 19 years, all of his life, he's 21 years old. So the punishment, this particular punishment, for the crime of aggravated criminal damage to property is grossly disproportionate with the severity of the crime that he's been convicted of.

Lastly, the defendant received ineffective assistance of counsel, Your Honor, during the plea negotiations. The Sixth and Fourteenth Amendment gives him a right to have counsel to defend him against the charges against him. And the Supreme Court requires that he receives effective assistance of counsel.

Essentially ineffective assistance of counsel is when there's a reasonable probably that, but for, the

defense counsel's deficient performance, the result of the proceeding would have been different. In this present matter the defendant was represented by the IDB. And although his defense counsel advised him of his boykin rights and the charges against him and what the potential penalties were for those charges, he was never advised of the immigration consequences of his guilty plea. Therefore, the defense counsel's performance was deficient. And as she failed to advise the defendant fully of all of his rights, or consequences of his guilty plea. And without the defense counsel's omission the result of the proceedings would have been different, in that, Mr. Montalbano would not have accepted the plea agreement, if he had known that he would be subject to detention by INS and deportation. Therefore, he received ineffective assistance of counsel.

And for these reasons, Your Honor, we're requesting that the Court vacate the guilty plea, set aside the sentence, so that we can reopen these proceedings and attempt to negotiate a plea agreement or have the matter tried with Mr. Montalbano knowing the consequences of his actions.

THE COURT:

I remember this case. There were four defendants. And there were several pretrial conferences involving all four of the defendants.

The defendant understood the boykin form when I read it to him. Now, as far as the consequences of what action might be taken by INS, if he's been here since he's three years old he had the opportunity to become a US citizen, and he wouldn't face this problem

with deportation. He chose not to do that. That was his choice for some reason.

I'm going to deny your motion.

MR. ORIHUELA

Your Honor, I request time to file for a writ to the appellate court.

THE COURT:

All right. How much time do you need?

MR. ORIHUELA:

Thirty days.

THE COURT:

All right.

MR. ORIHUELA:

Thank you Your Honor.

* * * *

CERTIFICATE

I, Linda E. LaBorde, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings heard in open court in Gretna, Louisiana, on May 26, 2000, before the Honorable Robert A. Pitre, Jr., Judge presiding in the matter entitled, STATE OF LOUISIANA versus ARNOLDO MONTALBANO and numbered CRIMINAL DOCKET NUMBER 99-5422.

S/LINDA E. LaBORDE
Linda E. LaBorde
Official Court Reporter
24th Judicial District Court
In and For the Parish of Jefferson
State of Louisiana

This 17th day of July, 2000.

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna, September 18, 2000,

DEAR SIR

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

State of Louisiana v. Arnoldo Montalban

No. 00 KH 1257

Very truly yours,

PETER J. FITZGERALD, JR.,
Clerk

Appendix 4